Testimony of Theodore M. Shaw, Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc., on the Nomination of Judge Samuel Alito to the United States Supreme Court

Good afternoon, my name is Theodore M. Shaw, the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. ("the Legal Defense Fund").

The Legal Defense Fund, whose first Director-Counsel was Thurgood Marshall, and which is no longer a part of the N.A.A.C.P., is the nation's oldest civil rights law firm and has served as legal counsel for African-American civil rights claimants in most of the major racial discrimination cases decided by the United States Supreme Court.

Through every step of the African American experience in this nation, the Supreme Court has – in ways both positive and otherwise – shaped the lives and opportunities of black Americans. *Dred Scott, Plessy v. Ferguson*, *Brown v. Board of Education*, *Grutter v. Bollinger*: these cases describe not only where we have stood as a nation, but in so many ways have circumscribed and defined the lives of African-American people. The Supreme Court is just as important today as it was in 1857 when *Dred Scott* was decided, or in 1954, when the late Justice Thurgood Marshall argued before the Court in *Brown*. From voting to education, criminal justice to employment, civil rights issues continue to affect the lives of African Americans every day. Who is on the Court – who decides – is thus a decision which merits the highest consideration.

As a lawyer, as a member of the Bar of the Supreme Court of the United States, as the head of an organization, the primary responsibility of which is to provide legal representation in cases involving racial discrimination, including in cases before the Supreme Court , and as a representative of the civil and human rights community that places so much trust and hope in our judiciary, I take no pleasure in the task that brings me here today. I am acutely aware that some people will dismiss all opposition to the nomination of Judge Alito to the Supreme Court as knee-jerk "liberalism." For us, however, this is not about "liberal" or "conservative", "right" or "left". We do not oppose nominees merely because they are conservative. Our concern is that judges are open minded, and that they decide cases based on the facts and the law.

Justice O'Connor's judicial philosophy has been conservative. In fact, in many race discrimination cases coming before the Supreme Court, the claimants did not win her vote. But, importantly, her vote was always in play. For a quarter of a century, the Supreme Court has decided most race discrimination cases by razor thin 5-4 margins. Justice O'Connor's vote was widely perceived to be the "swing vote"; the Court could go either way.

Unfortunately, Judge Alito's record does not reveal any of the pragmatism for which Justice O'Connor is well known. The overwhelming majority of African-American litigants whose claims Judge Alito have adjudicated has lost his vote. Judge Alito's confirmation to the Supreme Court will cause a substantial shift in the Court's civil rights jurisprudence in a manner that will make it significantly more difficult for civil rights plaintiffs to prevail. As a result, we and a number of other civil rights organizations oppose the nomination of Judge Samuel Alito to the United States Supreme Court as an Associate Justice.

We have prepared a detailed report discussing Judge Alito's record on various civil rights subject areas and detailing the reasons for our opposition, and I ask that the report be entered into the record. In my limited time today, I will highlight only a few issues.

First, for minority workers, women and others who depend on the nation's fair employment laws, Judge Alito's record is deeply troubling. In his fifteen years on the bench, Alito has almost never voted in favor of African-American plaintiffs in employment discrimination cases. Of the dozens of employment discrimination cases involving race in which Judge Alito has participated, he ruled for African Americans on the merits in only two instances. Further, he has never authored a majority opinion favoring African Americans in such cases. Moreover, in key cases, he has dissented from rulings of his colleagues for African-American plaintiffs and sought to impose upon plaintiffs claiming racial discrimination a higher burden of proof than Congress intended.

Judge Alito's comments regarding the Warren Court's decisions on "reapportionment" also are deeply troubling. Among other things, the Warren Court's reapportionment decisions are lauded for their role in barring state legislative schemes that dilute the voting strength of racial minorities by perpetuating inequitably drawn voting districts – districts in which the votes of citizens in one part of a state would be afforded, in some cases two times, five times or even ten times more weight than the votes of citizens in another part of a state. The Court

established the principle that every citizen has the right to an equally effective vote. In doing so, the Court set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation. These decisions have resulted in more effective political participation in the political process for all voters. Nevertheless, Judge Alito has criticized them. Just as importantly, in his only voting rights decision on the bench, he voted to uphold at-large electoral districts, thereby tolerating the types of electoral abuses that the principle of one person, one vote as well as the Voting Rights Act of 1965 were intended to end.

In the area of criminal justice, Judge Alito twice has written separately to express troubling views on a defendant's right to have a jury selected free of racial discrimination. In one case, he trivialized the serious matter of race discrimination in the selection of jurors by comparing it to whether someone is left-handed or right-handed. In another, Judge Alito suggested that a standard different from that announced by the U.S. Supreme Court should prevail.

Finally, we are deeply troubled by Judge Alito's record on affirmative action. In a brief attacking affirmative action, Samuel Alito used the following analogy: "Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate." This statement reveals a fundamental misconception of what affirmative action is about. Civil rights and affirmative action advocates are not asking for fences to be moved in; they are seeking opportunities to take the field, to stand at the plate. Hank Aaron, like Jackie Robinson, would never have had the opportunity to play in the Major Leagues, if Branch Rickey of the Brooklyn Dodgers and others had not "affirmatively acted" to desegregate baseball.

Our review of Judge Alito's record reveals that he has been remarkably consistent over the years. His views expressed as an advocate do not differ from his jurisprudence during fifteen years as an appellate judge. He has demonstrated a strong deference to government actors and employers in race discrimination cases, a narrow and cramped interpretation of civil rights laws, and a skewed skepticism of the claims of minority, female and other civil rights plaintiffs. Simply put, the question before us is whether African-American and other civil rights claimants would be better off before or after Judge Alito's confirmation to the Supreme Court. The clear answer is that civil rights claimants would be harmed by this confirmation.

While we would like to believe that Judge Alito would approach civil rights cases with an entirely open mind if he were confirmed to the Supreme Court, his record as an appellate judge contradicts any such view. We therefore respectfully but vigorously oppose his confirmation as Associate Justice of the United States Supreme Court.